In the High Court of Justice in Ireland.

EXCHEQUER DIVISION—THURSDAY, 16TH MAY, 1889.

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HARKEN.—HABEAS CORPUS.

JUDGMENT

OF

THE LORD CHIEF BARON.

Presented to both Houses of Parliament by Command of Her Majesty.

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EXCHEQUER DIVISION.—THURSDAY, 16th May, 1889.

Ex parte HARKEN.—HABEAS CORPUS.

JUDGMENT OF THE LORD CHIEF BARON.

In this case Mr. Healy moved for a conditional order for a writ of *habeas corpus*, with a view to discharge the prisoner from custody. It appeared that he had been charged, on the 15th January, 1889, before a court of summary jurisdiction, constituted under the Crimes Act, with having taken part in an unlawful assembly, and on the 2nd February an order was made that he should be imprisoned in the gaol of Londonderry for a term of five months with hard labour. From that decision of the court of summary jurisdiction an appeal was taken to the court of quarter sessions of the county of Donegal—the Chairman, of course, sitting as sole Judge—and he made an order by which he varied the punishment awarded to the applicant, and directed that he should be imprisoned in the gaol of Londonderry for three calendar months with hard labour, and at the expiration of the sentence give bail, himself in £10, with two sureties in £5 each, to keep the peace and be of good behaviour for twelve calendar months, or in default be further imprisoned for two calendar months without hard labour. Thus it will be seen that the *maximum* period of imprisonment which could be endured under the decision of the County Court Judge was five calendar months; a period less than that to which imprisonment by way of punishment under the Crimes Act is restricted. As, however, a conviction bad in part is bad in whole, it was admitted by the learned counsel for the Crown that if the direction to find sureties were in the nature of punishment, the sentence would be illegal, part of the punishment being of a character different from that authorised by the statute; and consequently the question has been admitted upon both sides to come to this—is or is not a direction to find sureties in the nature of punishment? If the Crown are right in their contention, it follows that a court of summary jurisdiction, or a Chairman upon appeal, can, if the case be one which in the opinion of the court requires it, inflict a punishment of six months imprisonment with hard labour, and then add a direction that the defendant should enter into a recognizance, with sureties, to keep the peace, and direct a term of imprisonment without hard labour in default of finding sureties. It is the result of such a decision that renders the case an important one.

Some propositions, material to the determination of this question, are perfectly clear.

First, it is clear that magistrates, upon a hearing for an offence (over which they have summary jurisdiction), even where they acquit of that offence, and acting solely upon the evidence upon which they so acquit, and without a written information may require the defendant to find sureties to keep the peace and be of good behaviour.

Secondly, it is settled that any court which has power to direct a person to find sureties, has, at common law, unless restricted by statute, power to commit that person to prison for a reasonable time, determinable upon his finding such sureties; and it is clear that there is no statute in this country which so restricts that power in the present case as to render the decision of the County Court Judge in that respect illegal, provided he had power to direct the defendant to find sureties.

Thirdly, it is also settled that upon a trial for a common law misdemeanor, the court has power, in addition to, or in lieu of, imprisonment, to direct the defendant to find sureties.

As to the first of these matters—although I treat them as outside the pale of practical discussion—it is right that I should refer to two of the cases which were cited during the argument. The first is *ex parte Davis* (1). There an information was made against Davis for assault and battery, and a summons issued against him for that offence. At the hearing the justices dismissed the information, and gave the defendant a certificate which, under the statute, was a bar to all future proceedings, civil or criminal; but they also ordered him, in respect of the said charge, to enter into his own recognizance in £50 to keep the peace for six months. The recognizance was sought to be brought up by *certiorari* to the Queen's Bench with a view to its being quashed; and that Court decided that, notwithstanding the dismissal of the information, the justices were legally justified in requiring the recognizance to keep the peace. Some of the observations of the learned judges are important upon the question we have to decide here. The counsel (Mr. Lloyd) says, "There was no information calling upon the defendant to enter into recognizances to keep the peace." Blackburn, J., replies, "I am not aware that any such information is necessary when the party is before the justices." Counsel says, "No threats were proved to have been uttered by the defendant." Cockburn, C. J.: "It often occurs that the justices say 'no assault has been proved, but there has been such violent conduct shown that we shall require recognizances to keep the peace.'" Mellor, J., adds, "The conduct of the party may have fallen short of an actual assault, but it may never-

(1) 24 *Law Times*, 547.

theless have been sufficient to justify his being bound over to keep the peace; he may have used violent language, which, though not an assault, may have shown an intention to commit one." Mr. Lloyd says, "The certificate would be a bar to all other proceedings founded upon the same cause, though in a different shape." Blackburn, J., replies, "Yes, to an action, or any proceeding *by way of punishment*, but this is only a precautionary proceeding, to prevent a breach of the peace."

That is a decision that where a case is before justices, not upon the ordinary application to compel the defendant to find sureties, but upon an unfounded charge of a criminal offence, the justices, although there has been a full acquittal from that charge, without any written information, but acting upon what they themselves have learned during the course of the investigation of that unfounded charge, have jurisdiction to direct the defendant to find sureties. The ground of the decision is that such a direction is not by way of punishment, but a precautionary proceeding, adopted by the court to prevent the commission of an offence which, from the evidence before it, it has reason to believe may possibly be committed in case it does not intervene.

The same principle is put even more strongly in *Lort v. Hutton* (1). That was a case not of an information charging an offence, but of an application for articles of the peace. The justices had held that a witness could not be called to contradict the evidence of the applicant; and the question was whether they were right in so holding. Counsel argued that "it is against the universal principle that a man may be always heard in his own defence." This is answered by Blackburn, J., in the only mode in which, as it appears to me, it was capable of being answered —viz.: "That argument would be irresistible if this were a case of *punishment*; but it is not." Subsequently, in giving judgment, he says: "The only thing that need be said is, that binding over a person against whom articles of the peace are exhibited is *not in the nature of a punishment*, but is to prevent the apprehended danger of a breach of the peace being committed; and that being so, the practice in the courts above and below must be the same in reference to the proceeding. When it appears on oath to the satisfaction of the justices to whom the complaint is made that there has been a threat, it must not be contradicted by any evidence, but their duty is to require recognizances to be entered into to keep the peace."

These two cases demonstrate that where Justices after the hearing of a charge of a criminal offence upon which the defendant has been acquitted, direct sureties to be given, the jurisdiction they exercise

(1) 45 *L. Journal*, N.S. Mag. Cases, p. 95.

is the same jurisdiction as they have on an application that sureties shall be given. Their inquiry in each of these cases is, whether from the character of the facts proved before them, it is to be apprehended that an offence *may* be committed. So much for the first point I have mentioned.

As to the second, that if the court have lawfully made an order that sureties shall be found, they have jurisdiction at common law, and without express enactment, to imprison for a reasonable time until such sureties are found, it is almost unnecessary to say more than that *some* power to enforce an order made within jurisdiction is inherent in every Court, and that the power of imprisonment is that which from the earliest times has been used to enforce orders of the description in question. I desire, however, to add that this power is expressly recognised by the Criminal Law Consolidation Acts, 24th and 25th Victoria —Acts which deal with certain criminal proceedings before Justices as well as with those before Courts of Record. Each of these statutes contains an enactment in these words :—

"Whenever any person shall he convicted of any indictable misdemeanor, punishable nnder this Act, the court may, if it shall think fit, in addition to or in lieu of any punishment hy this Act authorised, fine the offender, and require him to enter into his own recognizances and to find sureties, hoth or either, for keeping the peace and heing of good behaviour."

The enactment does not then proceed to expressly direct that the court may imprison in default of sureties being found, but on the contrary, provides "that no person shall be imprisoned for not finding sureties under this clause for any period exceeding one year." Thus the enactment is not an affirmative one, enabling the imposition of imprisonment, but a negative one, limiting to one year the period of an imprisonment which it recognises can be, but does not itself authorize to be, imposed. That very nearly, if not altogether, amounts to a legislative declaration that a power to direct sureties to he found implies and carries with it power to imprison in default. This, however, is no more than an affirmation of the common law. The sections I have referred to did not pass without observation. We all know that a severe criticism was passed upon them by Mr. Saunders; and I desire to call attention to the observations of Mr. Greaves in reply to that criticism, (which will be found at page 9 of the second edition of his work,) and which, as I am satisfied they correctly state the law, I adopt as my own :—[1]

"When an offender is convicted, and receives jndgment, he is in the custody of the sheriff, and the question is, not whether he is to he committed to prison—for he is actually in prison—hnt how he is to get out of prison; and the only means hy which he can lawfully get out of prison is by doing and suffering whatever ths court may lawfully adjudge him to do or to suffer."

(1) Greaves' "Criminal Law Consolidation Acts"—Second Edition—page 9.)

That necesearily carries with it the power of the Court to direct that he is to be discharged at the end of a certain period, although he shall not find suretiee. Mr. Greaves returns to the subject at page 10, and saye :—

"In Bennett *v.* Watson it was held that under those statutes a justice might lawfully commit a person who was a material witness upon a charge of felony brought before him, and who refused to appear at the sessions to give evidence, in order that her evidence might he secured at the trial; and Dampier, J., said the power of imprisonment is absolutely necessary to the existence of the statute of Philip and Mary. Unless there was such a power every person would of course refuse to enter into recognizances, and the magistrate could not compel him ; and then, if he could further avoid being served with a suhpœna, the delinquent might escape unpunished. This is a much stronger case than the case of a conviot required to find sureties, for he is already in prison, whereas the witness is at liherty, and therefore in his case the power both to apprehend and to commit is to he implied."

Probably there is not a judge either in England or Ireland who has not in cases within eome of thoee Criminal Law Consolidation Acts directed sureties to be found, and also that the prisoner should be detained for a limited time in default of, or until he should find, eureties.

Ae to the third preliminary point I have mentioned, that at common law, upon a conviction for a misdemeanor, the Court can, in addition to any other punishment which it has power to inflict, direct that sureties shall be found to keep the peace and for good behaviour, it is unneceesary to refer to any authority.

The queetion for our decision is not directly within any one of the three propositione I have mentioned; and it must be eolved by ascertaining the principle of law underlying those propositions, and then applying it to the case before us. In the first place, this is not a direction to find sureties upon an acquittal. Were there an acquittal, there would be no punishment, and as the direction would have been lawfully given, it would be impoesihle to contend that *in such a case* the direction to find suretiee, or the imprisonment under it, could amount to punishment. Admitting, however, that principle in the caee of an acquittal, Mr. Healy is justified in arguing that it does not neceesarily apply where, ae in the present case, there has been a conviction, because there is not any *a priori* impossibility in holding that, where a Court has power to punish and has power to imprison, fine, and require sureties, the requisition to find sureties is as much punishment as is imprisonment or fine. The principle, therefore, upon which *ex parte Davis* and *Lort* v. *Hutton* were decided is not in itself sufficient to justify a judgment here in favour of the Crown. Therefore the net question comes to this : whether, upon a conviction for a statutable offence, or a common law offence for which the punish-

ment is limited by statute, there is or is not a power, in addition to, and ovsr and above the statutable punishment, to direct that sureties shall be found. If there be, the decision of the learned County Court Judge was right; if there be no such power, it is wrong. I msntionod dnring the argument that I wished the authorities were looked into upon that question; and since then Mr. Molloy has refsrred us to a numbsr of cases, which he states to us he had previously shown to Mr. Healy, and in reference to which Mr. Healy has made an obssrvation to whioh I shall refsr hereafter. Those authorities ars clear and precise that in cases of statutable misdemeanors, the punishment for which is limited by statutes, not containing a direction that sureties for the peace or for good behaviour can be imposed, the Courts have been in the habit of adding that direction to their sentences.

The first case to which we have been referred is Rex *v.* Downey and others, tried at the Limerick Special Commission in May, 1831. There the indictment was under the first Whiteboy Act—15 and 16 Geo. 3, c. 21, s. 5—and the sentence will be found at page 30 of the Report of that Commission. The defendants were directed to be imprisoned for twelve calendar months with hard labour, and at the end of the imprisonment to give security to keep the peace for five years, themselves in £10 and two sureties of £5 each. I have looked into ths Whiteboy Act which created that offence, and it does not contain any direotion that a defendant may bs required to find sureties. It is therefore an express authority upon the question now before us. There are other cases in the same volume to which I do not think it necessary to refer in detail. There is a trial of John Nix and others, commenoing at page 25; the sentence in it will be found at page 30, and it directs not only imprisonment, but that sureties shall be found. That also was the case of an indictment under the same section of the first Whiteboy Act. Those sentenoes were pronounced by Mr. Justice Moore and Mr. Justice Jebb. I find the same course of proceeding was adopted at the Queen's County Special Commission in May, 1832, at which the judgss were Chief Justice Bushe and Baron Smith; and I think I may say that thsre has ssldom been a judge who was more merciful in his interpretation of the Whiteboy Acts than Chief Justice Bushe. I had occasion lately, in the Court of Criminal Appeal, to refer to some of his judgments and charges to the Grand Juries, and in all it will be found that he gives the strictest interpretation to the entire code of Whiteboy statutes. I look npon any decision of his against a prisoner under the Whiteboy Acts as carrying with it great weight. All through the trials at that Maryborough Special Commission the same course appears to have been adopted. At page 112 there will bs found

the trial of Delany and others, for assaulting and breaking into a dwelling house, and at page 307 there is the sentence. Some of the prisoners were directed to be transported; and one of them, Michael Malone, to be imprisoned for a year, and at the end of that time to give securities to keep the peace and be of good behaviour for seven years, himself in £50, and two sureties in £5 each. There are other cases under the Whiteboy Acts, but having already mentioned so many of them, it is unnecessary to occupy public time in referring to others.

These were Irish decisions, but to the same effect in England is Rhenwick Williams' case, (1) which was cited during the argument. In that case there were three separate indictments and separate successive sentences of two years imprisonment on each indictment; and then, over and above those terms of imprisonment, there was a general direction, incapable of being applied to any one particular indictment, that the prisoner should find sureties to be of good behaviour for a certain specified time. If that direction were to be treated as punishment, it would have been bad, and could have been reversed on error, as it was not attributed to any particular indictment. It therefore must have been treated as something different from punishment. Thus the practice in both countries is identical and uniform. What, then, is a direction to find sureties, pronounced after and by reason of a conviction? I have no doubt that it is an application by the tribunal after the decision of, and founded upon the knowledge it has acquired during the investigation of the case, of the old principle of the common law (which probably existed long previous to any statute of which record now remains), that those upon whom is imposed the duty of keeping the peace, be they conservators, justices, or Judges, have power to direct that sureties shall be given for good behaviour and for keeping the peace, if they are judicially satisfied that there is danger of a future breach of the peace.

I understand from Mr. Molloy that Mr. Healy, when the cases under the Whiteboy Acts were brought under his notice, asked that our attention should be called to the fact, that in those cases imprisonment in default of sureties was not expressly directed. The question, then, desired to be raised by Mr. Healy is this: Assuming that this sentence would be valid in the event of there having been no direction for imprisonment in default of sureties, is it made illegal by the direction for imprisonment in default for a certain limited time, or until he shall find sureties? It is because of this question that I made some observations at the outset, as to the common law power of a court. Those observations have answered by anticipation this objection; and it results from them, that I am of opinion, that the County Court Judge had power

(1) 1 Leach, C. C., 529.

to direct that the defendant should, in default of finding sureties, be imprisoned for a reasonable time, unless he in the meantime found sureties.

In consequence of the importance which this case may have in regard to future convictions under the Crimes Act, we have thought it necessary to give it the most careful consideration in our power; and my learned colleague, Mr. Justice Andrews, and myself, have each of us independently arrived at a clear conclusion that the learned County Court Judge had full power and jurisdiction to pronounce the judgment in question. We therefore decline to grant an order for a writ of *habeas corpus*.

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